

April 28, 2010

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Custom Catalogues OnLine, Inc.

Date of Filing: April 5, 2010

Case Number: TFA-0362

On April 5, 2010, Custom Catalogues OnLine, Inc. (Appellant) filed an appeal from a determination issued to it by the Oak Ridge Office (OR) of the Department of Energy regarding its request for documents that it submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In response to the Appellant's FOIA Request, OR provided the Appellant with a number of documents. However, OR also withheld in their entirety various other documents. This Appeal, if granted, would require that OR release the withheld documents.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under Department of Energy (DOE) regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On September 23, 2009, the Appellant submitted a FOIA request (Request) asking for copies of any documents referring to Mr. Philip Pulver (Pulver), Custom Catalogs OnLine, "CCOL," CCOL-MDM or "Mobile Data Methods" which were in the possession of or originated from a number of named employees of the DOE's Pacific Northwest Site Office and OR. *See* April 5, 2010, Appeal from Philip Pulver, President, Custom Catalogs OnLine, Inc. at 5.¹

In its February 19, 2010, response, OR provided the Appellant with a number of documents. However, OR informed the Appellant that "several documents" were being withheld in their entirety pursuant to Exemption 5 and the "attorney work product and/or attorney-client privilege." *See* February 10, 2010, Letter from Gerald G. Boyd, Manager, OR to Philip Pulver (Determination Letter) at 1. OR described the withheld documents as those including correspondence that "reveals the motive of the client in seeking legal advice" or the "advice and thoughts of Office of Chief Counsel personnel" on legal issues. Determination Letter at 1. OR also concluded that discretionary release of the withheld documents would not be in the public

¹Custom Catalogs OnLine, Inc. is in litigation with Battelle Memorial Institute (Battelle), which currently manages several DOE National Laboratories.

interest since disclosure would have a negative effect on the willingness of attorneys to provide the government with honest and open evaluations on issues. Determination Letter at 2.

In its Appeal, the Appellant makes a number of assertions regarding alleged misconduct at Battelle-managed DOE facilities. The Appellant alleged that release of the documents would shed light on this misconduct and that release of the documents would be in the public interest.²

II. Analysis

According to the FOIA, after conducting a search for responsive documents under the FOIA, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

An agency therefore has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *State of New York*, Case No. TFA-0269 (August 19, 2008) *slip op.* at 2-3.³ Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *Id.* at 3. A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Id.*

For our review of this Appeal, we obtained the documents that OR withheld. After examining these documents, we conclude that OR's determination letter is clearly inadequate to permit the Appellant to file an informed appeal. We find that, in contrast to the Determination Letter's description of withholding "several" documents, in fact, approximately 90 responsive documents were withheld from the Appellant.⁴ While OR's description of the material withheld does apply to a significant number of the documents, there are a number of withheld documents, such as apparently commercial documents and filed court pleadings, to which OR's description seems

² The Appellant submitted additional submissions on April 8, 21 and 26, 2010, providing additional information regarding his misconduct allegations and his argument that release of the withheld documents would be in the public interest.

³ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

⁴ We counted 92 documents (457 pages) in the submissions OR provided us in response to our request for a copy of the withheld documents. However, it is unclear whether some of the documents are included as attachments to Emails or are stand-alone documents.

inapplicable. Additionally, OR's Determination Letter does not specify which Exemption 5 privilege is being applied to each withheld portion of each document.

Consequently, we will remand this matter to OR so that it may issue a new determination letter either adequately justifying the withholding of these previously withheld documents or releasing these documents to the Appellant.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Custom Catalogues OnLine, Inc., OHA Case Number TFA-0362, is hereby granted.

(2) This matter is hereby remanded to the DOE's Oak Ridge Office which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 28, 2010